

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of the Embarq Local Operating)	
Companies for Forbearance from or,)	WC Docket No. 07-258
Alternatively, Waiver of the Contract)	
Tariff Filing Requirements in the)	
Commission's <i>Pricing Flexibility Rules</i>)	

COMMENTS OF THE NEW JERSEY DIVISION OF RATE COUNSEL

Ronald K. Chen,
New Jersey Public Advocate

Stefanie A. Brand,
Director
New Jersey Division of Rate Counsel
31 Clinton Street, 11th Floor
Newark, NJ 07102
(973) 648-2690 - Phone
(973) 648-2193 - Fax
www.rpa.state.nj.us

On the Comments:
Christopher J. White,
Deputy Public Advocate
Maria T. Novas-Ruiz,
Assistant Deputy Public Advocate
On Behalf of Rate Counsel

Date: December 14, 2007

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Petition of the Embarq Local Operating)	
Companies for Forbearance from or,)	WC Docket No. 07-258
Alternatively, Waiver of the Contract)	
Tariff Filing Requirements in the)	
Commission's <i>Pricing Flexibility Rules</i>)	

COMMENTS OF THE NEW JERSEY DIVISION OF RATE COUNSEL

I. INTRODUCTION

In response to the Commission's Public Notice released on November 14, 2007,¹ the New Jersey Division of Rate Counsel ("Rate Counsel") (formally the New Jersey Division of the Ratepayer Advocate)² hereby submits its comments in response to DA 07-

¹ / See Public Notice, DA-07-4617, dated November 14, 2007, establishing a pleading cycle with Comments due on November 29, and reply comments due on December 14, 2007. On November 19, 2007, COMPTTEL filed a Motion for Extension of Time, pursuant to said motion, the due dates for comments were charged to: December 14, 2007 and reply comments to January 10, 2008.

²/ Effective July 1, 2006, the New Jersey Division of the Ratepayer Advocate is now Rate Counsel. The office of Rate Counsel is a Division within the New Jersey Department of the Public Advocate. The Department of the Public Advocate is a government agency that gives a voice to New Jersey citizens who often lack adequate representation in our political system. The Department of the Public Advocate was originally established in 1974, but it was abolished by the New Jersey State Legislature and New Jersey Governor Whitman in 1994. The Division of the Ratepayer Advocate was established in 1994 through enactment of Governor Whitman's Reorganization Plan. See New Jersey Reorganization Plan 001-1994, codified at N.J.S.A. 13:1D-1, et seq. The mission of the Ratepayer Advocate was to make sure that all classes of utility consumers receive safe, adequate and proper utility service at affordable rates that were just and nondiscriminatory. In addition, the Ratepayer Advocate worked to insure that all consumers were knowledgeable about the choices they had in the emerging age of utility competition. The Department of the Public Advocate was reconstituted as a principal executive department of the State on January 17, 2006, pursuant to the Public Advocate Restoration Act of 2005, P.L. 2005, c. 155 (N.J.S.A. 52:27EE-1 et seq.). The Department is authorized by statute to "represent the public interest in such administrative and court proceedings ... as the Public Advocate deems shall best serve the public interest," N.J.S.A. 52:27EE-57, i.e., an "interest or right arising from the Constitution, decisions of court, common law or other laws of the United

4617, under WC Docket No. 07-258, asking for forbearance with regard to certain provisions of the Federal Telecommunications Act of 1996. On October 19, 2007, Embarq Local Operating Companies' filed a petition for forbearance or alternatively waiver of the "Contract Tariff Filing" requirements, of the Commission's *Pricing Flexibility Rules*.

In its petition and pursuant to Section 160(c),³ Embarq asks the Federal Communications Commission ("Commission") to forbear from its rules which require Embarq to file contract tariffs in areas where Embarq has or may receive Phase I or Phase II pricing flexibility,⁴ as applicable under sections 69.727(a), 61.58 and 61.55 of the *Pricing Flexibility Rules*.⁵ Embarq states that the Commission's *Pricing Flexibility Rules* were designed to foster and to further enhance robust competition where competitive entry had already occurred, by allowing price cap ILECs some flexibility to design customer specific pricing.⁶ Embarq contends that it has been "competitively harmed" by the continued requirement of contract tariff filings because the requirement, 1) provides a

States or of this State inhering in the citizens of this State or in a broad class of such citizens." N.J.S.A.52:27EE-12; The Division of Rate Counsel, formerly known as the Ratepayer Advocate, became a division therein to continue its mission of protecting New Jersey ratepayers in utility matters. The Division of Rate Counsel represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. Rate Counsel participates in Federal and state administrative and judicial proceedings.

³/ 47 U.S.C. § 160(c).

⁴/ Embarq has Phase I pricing flexibility in 9 Metropolitan Statistical Areas ("MSAs") and Phase II pricing flexibility in 10 additional MSAs, a list of which is attached to their petition as attachment B.

⁵/ 47 U.S.C. §§ 69.727(a), 61.58 and 61.55.

⁶/ Embarq petition at p. 2. See also, ("Pricing Flexibility Order"), *Access Charge Reform; Price Cap Performance 'Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, Fifth Report & Order and Further Notice of Proposed Rulemaking*, 14 FCC Rcd 1422 ¶ 1(1999) (citations omitted).

competitive advantage to its rivals, since once the marketplace knows Embraq's price, terms and conditions, they can meet or just beat Embraq's offerings, and 2) has created an artificial "price floor" which undercuts innovation and competition and harms consumers by depriving them of the opportunity to buy telecom services in an aggressively competitive market.⁷ Embraq contends that substantial competition exists that does not rely on the ILEC network, and that competition is adequate to support elimination of the "Contract Tariff Filing" requirements.

II. SUMMARY

Rate Counsel urges the Commission to deny the petition due to the petitioner's failure to meet the standards of proof set forth in Section 160 of the Telecommunications Act of 1996, which is required before the Commission can exercise its forbearance authority.

The forbearance standard in Section 160 is only allowed where the enforcement of the regulation or section of the Act at issue is not necessary to ensure that charges, practices, classifications or regulations are just and reasonable and are not unjustly or unreasonably discriminatory, not necessary for the protection of consumers, and is in furtherance of the public interest.⁸ The Commission has already addressed Embraq's request for forbearance from section 160(c) and granted Embraq limited relief from tariff filing obligations for a distinct group of broadband services, including but not limited to: Frame Relay, ATM Services, LAN Services, Ethernet-Based Services, non-TDM based,

⁷/ Embraq petition at pp. 1-5.

⁸/ 47 U.S.C. § 160(a).

packet-switched broadband services and optical transmission services, on the basis that competitive conditions existed that would ensure that services would be just and reasonable and not unreasonably discriminatory and safeguard the rights of consumers.⁹ Now, Embarq is requesting further forbearance as to “Contract Tariff Filing” requirements.

Embarq’s petition fails to provide any basis why elimination of the “Contract Tariff Filing” requirements is warranted and in the public interest. Forbearance cannot be granted on mere conjecture and assertions absent a compelling showing that no harm will occur. Embarq has not shown that the “Contract Tariff Filing” requirements are unnecessary. Rate Counsel submits that Embarq’s petition is an attempt to modify the Commission’s *Memorandum Opinion and Order* (“*Order*”) granting forbearance to Embarq and Frontier in FCC WC Docket Number 06-147, through the filing of this forbearance request. If Embarq was unsatisfied with the Commission’s *Order*, Embarq should have requested reconsideration of that *Order* or in the alternative, should have filed an appeal of that *Order*. The Commission should not permit Embarq to circumvent/modify the Commission’s *Order* by filing for forbearance at this time. The Commission relied upon the continued existence of the “Contract Tariff Filing” requirements as a basis for its *Order*. This filing is an end run around the limitations found necessary to protect the public interests. Embarq’s mere claims that it is at a competitive disadvantage against cable companies is inadequate support for elimination of the “Contract Tariff Filing” requirements. For the reasons set forth herein Rate Counsel respectfully requests that the

⁹ / I/M/O *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. §160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements, and Petition of Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. §160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, WC Docket No. 06-147 (“*Embarq/Frontier Forbearance Memorandum Opinion and Order*”) Rel. October 24, 2007, at paragraphs 28, 29 and 30.

Commission not grant Embarq's request for forbearance from the "Contract Tariff Filing" requirements.

III. THE PETITION SHOULD BE DENIED BECAUSE EMBARQ HAS FAILED TO PROVE THAT CONTINUED REGULATION IS NOT NECESSARY FOR THE PROTECTION OF CONSUMERS AND THE INTEREST OF THE PUBLIC

Rate Counsel urges the Commission to deny the petition due to the petitioner's failure to meet the standards of proof set forth in Section 160 of the Telecommunications Act of 1996, which is required before the Commission can exercise its forbearance authority.

The forbearance standard of Section 160 is only satisfied where the enforcement of the regulation or section of the Act at issue is not necessary to ensure that charges, practices, classifications or regulations are just and reasonable and are not unjustly or unreasonably discriminatory, not necessary for the protection of consumers, and is in furtherance of the public interest.¹⁰ Rate Counsel submits that Embarq has failed to demonstrate that each element required for forbearance has been met. If the petition is granted, consumers will be denied the necessary safeguards to ensure that rates, terms and conditions are just, fair, and reasonable; consumers will have no protections and consumers will be denied the promise of the Act, more choice, technological innovation and lower prices.

Embarq has failed to satisfy the first prong for a grant of forbearance. Section 160(a) requires that the Commission find that regulation is no longer necessary to ensure that telecommunications services are just reasonable and not discriminatory. Embarq's

¹⁰/ 47 U.S.C. § 160(a).

petition simply does not provide any probative and reliable data upon which the Commission can grant forbearance from the Commission's "Contract Tariff Filing" requirements.

The Commission's policy and requirement to file contract tariffs for the protection and in furtherance of the public interest is clear and unambiguous. The Commission predicated the relief afforded in the *Order* on the continuation of the "Contract Tariff Filing" requirements. The Commission stated that "[E]ven when price cap carriers are permitted to tailor services to their customers through individually negotiated contracts under the *Pricing Flexibility Order*, our rules still require these contract-based tariffs to be filed with specified information that is available publicly to any party, including competitors."¹¹ Moreover, the *Order* specifically states that Embarq "will continue to be subject to sections 201 and 202 of the Act, in their provision of their specified broadband services, which, among other things mandate that the petitioners provide interstate telecommunications services upon reasonable request and prohibit them from acting in an unjust and unreasonable manner or otherwise favoring particular entities in the provision of "like" services provided to other entities."¹²

Embarq's petition for forbearance lacks any data to support the elimination of the "Contract Tariff Filing" requirements that the Commission relied upon in granting forbearance to Embarq for its broadband services. Embarq could have either filed a request for reconsideration of the Commission's *Order*, or filed an appeal of the *Order*, had Embarq wanted relief from the "Contract Tariff Filing" requirements. Embarq did neither.

¹¹ / *Embarq/Frontier Forbearance Memorandum Opinion and Order*, October 24, 2007, *supra* at paragraph 33, citing to 47 C.F.R. 61.55 (requirements for contract based tariffs).

¹² / *Id* at paragraph 34, citing to 47 U.S.C. 201-202.

Embarq has also failed to satisfy the second prong necessary for a grant of forbearance. Embarq has failed to demonstrate that “Contract Tariff Filings” are no longer necessary for the protection of consumers. Embarq claims that on a wire center basis continuation of the “Contract Tariff Filing” requirement as applied to special access causes a competitive disadvantage when competing against cable companies.¹³ However, as the Commission noted in the recent *Verizon Forbearance Memorandum Opinion and Order*, issued on December 5, 2007, current evidence demonstrates that “[M]ost cable operators state that their networks are primarily in residential areas and their provision of services to enterprise customers are still in the initial stages.”¹⁴ Rate Counsel also notes that Embarq’s petition completely ignores the fact that the services offered by cable companies for the mass market includes bundled products. Cable companies do not offer a stand alone local service or a stand alone long distance product to mass market customers. Embarq offers no evidence that its competitive position vis-à-vis cable companies is harmed by the continuation of the “Contract Tariff Filing” requirements. Eliminating the “Contract Tariff Filing” requirements for Embarq under the facts herein is simply not in the public interest.

More importantly, as the Commission observed and noted in its *Order*, issues regarding special access, should be addressed in the open *Special Access Rulemaking* proceeding, under FCC WC Docket No. 05-25.¹⁵ Such is the case here. Embarq’s issues regarding the elimination of the “Contract Tariff Filing” requirements in so far as special

¹³ / Embarq petition at p. 9.

¹⁴ / *Petitions of Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. §160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas, Memorandum Opinion and Order* WC Docket No. 06-172, (“*Verizon Forbearance Memorandum Opinion and Order*”) released December 5, 2007, at footnote 116.

¹⁵ / Special Access Rate for Price Cap Local Exchange Carriers Notice, 20 FCC Rcd at n.43.

access, are better addressed and reviewed under the Commission's ongoing *Special Access Rate proceeding*. Therefore, Embarq's petition for forbearance should be denied.

Lastly, Embarq's petition also fails to satisfy the third prong of the forbearance test that examines whether the forbearance is in the public interest. Embarq has failed to provide evidence to show that a grant of this petition promotes the public interest and protects consumers. The protections of Sections 61.58, 61.55 and 69.727(a) are necessary to accomplish the goals and objectives of the Act, as previously found necessary by the Commission. The continued requirement for "Contract Tariff Filings" will ensure that customers are protected against pricing and service discrimination. In short, Embarq has failed to show that continued compliance with the Commission's "Contract Tariff Filing" requirements have placed it at a competitive disadvantage. Similarly, Embarq has failed to meet its burden of showing compliance with any of the criteria required by Section 160 so as to relieve Embarq from the Commission's "Contract Tariff Filing" requirements.

Furthermore, Section 160 is constitutionally infirm in that it violates the doctrines of separation of powers and equal protection, and the 10th and 11th amendments to the Constitution. Rate Counsel renews the arguments and incorporates those arguments hereto with respect to the constitutional infirmities associated with the Commission's forbearance authority.¹⁶

Rate Counsel submits that the grant of the petition, if approved, will result in higher prices, fewer alternatives, and decreased service quality. The Commission should deny Embarq's request for forbearance from the "Contract Tariff Filing" requirements.

¹⁶ / See Rate Counsel's Ex Parte filing dated December 7, 2004 in the UNE Remand proceeding (CC Docket No. 01-338 and WC Docket No. 04-313).

IV. CONCLUSION

The Commission should not grant the petition. Ultimately, the grant of any relief would harm ratepayers. Such a result is contrary to the public interest. Therefore, Rate Counsel urges that the Commission to deny the petition.

Respectfully submitted,

Ronald K. Chen,
New Jersey Public Advocate

Stefanie A. Brand,
Director
New Jersey Division of Rate Counsel

By: *Christopher J. White*
Christopher J. White, Esq.
Deputy Ratepayer Advocate

Date: December 14, 2007